Joint Committee on Boards, Commissions and Consumer Protection

BACKGROUND PAPER FOR HEARING JANUARY 4, 2005

ACUPUNCTURE BOARD

BACKGROUND, IDENTIFIED ISSUES, AND QUESTIONS

BRIEF OVERVIEW OF THE ACUPUNCTURE PROFESSION AND THE ACUPUNCTURE BOARD

This is the Acupuncture Board's (Board) third major review since 1998. At the last sunset review in 2002, the Committee had several concerns that required additional input from an outside body. The Little Hoover Commission (LHC) was charged by statute with examining and reporting on a number of those concerns. It released its report in late 2004. What it, and the Committee's investigation reveal is that, while the vast majority of the Board's licensees are competent, responsible, professional and provide a valuable and valued service, the Board itself may not be serving the public and those licensees well. Specifically, the Board:

- Misreads its governing statutes concerning the scope of practice of licensees;
- Seeks to erect significant barriers to new acupuncturists becoming licensed;
- Potentially endangers the public by refusing to promulgate regulations concerning sterilization of the needles used by acupuncturists – or even to discuss this issue as an agenda item in any public meeting; and
- Fails to take resolute and definitive steps to address the unlicensed practice of acupuncture by unlicensed assistants – some apparently as young as 18 – and by other health care providers.

With unusual candor, the LHC report identifies the core problem this way:

> "Many of the specific issues that the Governor and the Legislature asked the Commission to review have festered because the Acupuncture Board has often acted ***as a venue for promoting the profession rather than regulating the profession***." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework: September 2004*, page 63 – emphasis added).

Acupuncture has for centuries been used successfully to treat patients in the Far East. Acupuncturists use techniques to stimulate certain points of the body by inserting needles through the skin to treat a wide variety of health conditions. In California, acupuncture was first regulated by the Medical Board in 1972. In 1976, the Acupuncturist Committee of the Medical Board was created and acupuncturists became licensed in California. However, they were allowed to treat patients only upon being referred by physician.

In 1980, the Acupuncture Licensing Act (B&P Code Section 4925) was created and acupuncturists were allowed to treat patients without a referral from a physician. In 1999, the Acupuncture Committee was renamed the California Acupuncture Board, formally ending the Medical Board's jurisdiction over the profession.

The Board's "primary responsibility … is to protect California consumers from incompetent, and/or fraudulent practice through the enforcement of the Acupuncture Licensing Act and the Board's regulations." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 2) To this end, the Board's mandate is to regulate the practice of acupuncture and Oriental medicine in California by establishing, licensing, and maintaining the integrity of the acupuncture profession. (*The California Acupuncture Board, 2004 Sunset Review Report*, page 1)

The Board's current membership is as follows:

BOARD MEMBER NAME	APPOINTED BY	TERM EXPIRES	REPRESENATION
Shari Asplund	Senate Rules	07/01/05	Public
(VACANT)	Governor		Public
Justin Tin	Governor	06/01/07	Public
(VACANT)	Governor		Licensed Acupuncturist
Larry Yee*	Assembly Speaker	06/01/08	Public
Joan C. Chang	Governor	06/01/07	Licensed Acupuncturist
(VACANT)	Governor		Licensed Acupuncturist
(VACANT)	Governor		Licensed Acupuncturist/Faculty Member
(VACANT)	Governor		Licensed M.D.

* New Member appointed by the Assembly Speakers Office on December 1, 2004.

PRIOR SUNSET REVIEW

Most of the current issues for review are the same as those the Committee grappled with two years ago. They are:

- Whether the Board is currently misreading legislative intent language mentioning acupuncturists as a "primary health care profession." The Board believes such intent language allows acupuncturists lawfully to diagnose not just on the basis of Oriental medical precepts, but Western ones as well.

- Whether the education required to become a licensed acupuncturist should increasingly embrace Western medical disciplines typically learned mostly by soon-to-be physicians.

- Whether the Board is currently allowing the unlicensed practice of acupuncture by assistants and other professionals.

In addition, there is a question about whether the Board is willing or able to accept the direction of this Committee. For example, beginning in 1998 the Committee had asked the Board to evaluate the national examination and compare it to the Board's examination, called the California Acupuncture Licensing Examination (CALE). As of 2002, the Board had still not accomplished this task.

Also beginning 1998, the Committee had asked the Board to evaluate, compare, and make recommendations on the school approval process of the Bureau of Private Postsecondary Education (BPPVE), the Accreditation Commission of Acupuncture and Oriental Medical (ACAOM) and the Board's process. As of 2002, the Board had not accomplished this task either.

Thus, two years ago, the Committee by statute requested the LHC to explore the scope of practice/educational issues. (B&P Code Section 4934.1)

The Little Hoover Commission Report

Specifically, LHC was asked:

1. To review and make recommendations on the lawful and appropriate scope of practice for acupuncturists. This was an issue because the Board believes that acupuncturists under current California law are considered to be "primary health care professionals" lawfully able to "diagnose" using both Oriental and Western disciplines.

2. To review and make recommendations on the educational requirements for acupuncturists. This is an issue because, to the extent that an acupuncturist's scope embraces medical practices typically labeled as "Western," they will require training in those disciplines.

3. To evaluate the national examination by the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM), and make recommendations whether, given the time, expense, and effort of using a California-only test, the national exam should be offered instead of or as part of the State's examination.

4. Evaluate and make recommendations on the approval process of the ACAOM, approval process of the BPPVE, and the Board's own acupuncture school approval process. This was an issue because when the Board was reviewed in 1998, the Committee concurred with the Board that the BPPVE or a similar approval for schools outside California should be a prerequisite for Board approval of schools. (B&P Code Section 4926)

Board Report

A second report was to be performed by the Board itself addressing the issues of unlicensed acupuncture being performed by acupuncture assistants and ways to improve the auditing and quality of the Board's continuing education program. (B&P Code Section 4934.2)

B&P Code Section 4934.2 required the Board by September 1, 2004 to do the following:

1. The Board shall conduct a study of the use of unlicensed acupuncture assistants and the need to license and regulate those assistants. [This was an issue because complaints about unlicensed activity have remained in the top three categories of new complaint cases for the past three years.]

2. The Board shall study and recommend ways to improve the frequency and consistency of their auditing and the quality and relevance of their continuing Education (CE) program. [This was an issue because it was unclear to the Committee whether the Board uses their authority to audit licensees to ensure compliance with CE requirements.]

The results of these reports will be discussed in more detail below.

NEW ISSUES

As stated, most of these issues are outstanding from prior sunset reviews dating back to 1998. Some, however, are new issues this year.

ISSUE #1: Whether the Board should be transformed into a bureau or be fully reconstituted.

Issue #1 question for the Board and DCA: *Should the Board be transformed into a bureau or be fully reconstituted?*

Background: As discussed in more detail below, this Board has for years been unable or unwilling to address scope of practice issues that go to the core of its public protection function, and appears to either misunderstand its legislative authority, or to be directly flouting it.

As further discussed below, fundamental public protection issues that the Board should be resolving with dispatch and on its own initiative must instead be repeatedly addressed by the Committee, which, in turn, must resort to outside assistance such as the LHC. Even when the Board does study a problem, still more study is often required, with no assurance as to when the study will be done, or when definitive action will ever be taken to protect the public. Moreover, the Board has had some difficulty since its inception recruiting members, or having enough members to constitute an ordinary quorum.

New issues identified by LHC relating to public safety – notably, the issue of whether clean needles are being used – reinforce both the need for a Board that acts swiftly and definitively on its own accord and underscores the fact that this Board fails by that measure.

Finally, and most worthy of emphasis, the LHC has concluded that the Board has "often acted as a venue for promoting the profession rather than regulating the profession." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework: September 2004*, page 63). ***This means that the Board is, according to the LHC, "often" violating its very reason for being; namely, protecting consumers.***

ISSUE #2: Scope of practice, related educational requirements, and proposed Board legislative amendment.

Issue #2 question for the Board and DCA: *What are the key differences between the scope of practice of an acupuncturist and the scope of practice of a physician? Does current law permit acupuncturists to act as primary care providers, even to the extent of diagnosing, prescribing, and referring based upon Western models of medicine? How should the Board educate potential licensees, depending upon the answers to these previous questions? How can the Board reconcile vast increases in educational requirements for new licenses while arguing that 30 hours of continuing education every 2 years for current licenses is adequate?*

According to the LHC's report, "some of those advocating for greater Western training are seeking the title of 'doctor' and access to insurance reimbursements -- making it difficult to sort out economic aspirations from medical issues." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 21)

Hence, the most difficult issues raised by the Committee's review of the Board are those that address the lines between providers of so-called "Western" medicine (e.g., physicians) and providers trained in so-called "Eastern" medicine; namely, acupuncturists.

The overall question may be framed this way: Is the Board simply implementing the scope of practice established by the Legislature and the Governor? Or is the Board, through a kind of regulatory "creep," step by small step, expanding acupuncturist's scope, thereby overriding the Legislature's enactments or invading the Legislature's prerogatives?

In answering these questions, the Committee must confront and resolve three specific issues:

- Issues related to the **scope of practice** of acupuncturists;
- Issues related to their **educational requirements**; and
- Issues related to a **legislative amendment sought** by the Board.

What is ***not*** at-issue here is what the line should be between acupuncturists and physicians. The questions addressed here are restricted to what the law currently provides.

1. Scope Of Practice Issues

A. The scope of practice statute in current law

The scope of practice for the Board's licensees is set out in clear and precise language in B&P Code section 4927 and 4937.

Section 4927 (c) and (d) defines "Acupuncturist" and "Acupuncture":

> "(c) 'Acupuncturist' means an individual to whom a license has been issued to practice acupuncture pursuant to this chapter, which is in effect and is not suspended or revoked.
>
> (d) 'Acupuncture' means the stimulation of a certain point or points on or near the surface of the body by the insertion of needles to prevent or modify the perception of pain or to normalize physiological functions, including pain control, for the treatment of certain diseases or dysfunctions of the body and includes the techniques of electroacupuncture, cupping, and moxibustion."

Section 4937 sets out the specific authorization for what licensees may practice: "An acupuncturist's license authorizes the holder thereof: (a) To engage in the practice of

acupuncture." This is a plain and unambiguous statement – an acupuncturist's license authorizes them to engage in the "practice of acupuncture," as that practice is delimited by section 4927 (d).

In addition, section 4937 gives acupuncturists some additional authority to practice a number of other forms of Oriental treatment. However, as set out in subdivision (b), these treatments (unlike the practice of acupuncture itself) are not restricted to the acupuncture profession:

> "(b) To perform or prescribe the use of oriental massage, acupressure, breathing techniques, exercise, heat, cold, magnets, nutrition, diet, herbs, plant, animal, and mineral products, and dietary supplements to promote, maintain, and restore health. Nothing in this section prohibits any person who does not possess an acupuncturist's license or another license as a healing arts practitioner from performing, or prescribing the use of any modality listed in this subdivision."

As well, under current law, a patient does not need prior diagnosis or referral from a licensed physician in order to seek treatment from an acupuncturist.

B. The Board's controversial interpretation of the scope of practice

The confusion about an acupuncturist's scope of practice begins with the Board's interpretation of current law. Despite the clear language setting out the scope of practice, the Board has interpreted the fact that no referral from a physician is needed to mean that an acupuncturist can diagnose a patient's overall healthcare needs. (See, e.g., *Acupuncture Board, 2004 Sunset Review Report*, pages 3 and 20)

Moreover, the Board's understanding (or misunderstanding) of its authority is further based upon the following language, taken, not from the Legislature's establishment of the scope of practice, but from legislative intent. The key provision is underscored:

> **"4926 Legislative intent**
>
> "In its concern with the need to eliminate the fundamental causes of illness, not simply to remove symptoms, and with the need to treat the whole person, the Legislature intends to establish in this article, a framework for the practice of the art and science of Oriental medicine through acupuncture.
>
> The purpose of this article is to encourage the more effective utilization of the skills of acupuncturists by California citizens desiring a holistic approach to health and to remove the existing legal constraints which are an unnecessary hindrance to the more effective provision of health care services. **Also, as it affects the public health, safety, and welfare, there**

is a necessity that individuals practicing acupuncture be subject to regulation and control as a primary health care profession."

The Board relies on this intent language as establishing a scope of practice for acupuncturists that permit them to be a primary health care provider across multiple disciplines, including Western medicine. As well, according to the Board's 2004 Sunset Review Report, "legislation in 1978 established acupuncture as a 'primary health care profession' by eliminating the requirement of prior diagnosis or referral by a licensed physician." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 1).

Phrased another way, the Board is arguing that since the Legislature did away with the requirement that a "note" was required from another kind of provider (e.g., medical doctor) to see an acupuncturist, that – plus the intent language -- means that an acupuncturist may act as a primary care "gatekeeper" not just within Oriental disciplines, but also ***lawfully capable of referring patients to other disciplines based at least in part upon Western medical principles.***

This interpretation of a vastly expanded scope of practice leads the Board to other, equally consequential expansions. For example, the Board continues to seek increase after increase in the number of educational hours required to become an acupuncturist capable of performing functions as a "primary health care professional." The Board states that the "current level of education [i.e., 2,348 hours, a result of one of the Board's recent increases in educational hours] has not kept pace with the expanded role of a primary health care practitioner." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 20). The Board claims that it is "their main objective to set a standard that protects the consumer and assures a level of education that is consistent with all other first-contact health care professionals who provide comprehensive and routine care." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 20).

According to the Board, a survey performed in 2000 concluded that licensees ". . . did not feel they were adequately trained to begin practice. Specifically they indicated a lack of skills in clinical practice, western medicine and herbal medicine." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 20). In support of the Board's findings, it states that "the 2001 Occupational Analysis performed by the Department of Consumer Affairs Office of Examination Resources showed three key content areas of practice which had increased since the previous analysis: western sciences diagnosis, clinical practice and use of herbs." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 20). Therefore, the Board is urging yet another increase of 1,000 hours, bringing the total required to become a new acupuncturist up to about 4,000 hours – the highest in the nation.

Thus, what the Board wants is a one thousand hour increase in educational requirements for licensure based on the premise that acupuncturists should be expert in (1) herbal medicine, a part of their practice that is *not limited* to acupuncturists, and may be practiced in California even by non-licensees; and (2) *Western* medicine, an aspect of

practice that has long been the sole jurisdiction of other boards; specifically the Medical Board. And all of this proceeds from the Board's original interpretation – that legislative intent language with no legal force in and of itself and eliminating the requirement of a referral have together had the effect of expanding the acupuncture scope of practice to embrace Western modalities.

C. LHC and the Legislative Counsel disagree with the Board's interpretation

This is one of the issues the Committee asked the LHC to study. Both LHC and Legislative Counsel disagree with the Board's reading of state law. Hence, according to LHC: "attorneys for the Acupuncture Board have crafted legal opinions based on the intent language … in order to broaden educational requirements such as more Western medical training as it relates to diagnosing a patient as a 'primary health care profession.'" (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework: September 2004*, page 19).

Regarding the intent language, the LHC observes:

> "The legislative intent of Section 4926 was added by AB 3040 (Knox). The purpose of the bill was to establish a separate examining committee and expand the list of modalities. Scant attention in the analysis [of the bill] was given to the words 'primary care' or the implications of the intent language in the bill. The Department of Consumer Affair's annual report for 1980 summarizes the changes made by the bill, but does not mention acupuncture becoming a 'primary care profession."

(*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 17)

Relying on a Legislative Counsel opinion, LHC likewise asserts:

> "According to Legislative Counsel's legal opinion on the scope of practice for acupuncturists, it concluded that the intent language does not broaden an acupuncturist's scope of practice."

(*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 18)

Finally, LHC agrees that allowing acupuncturists to serve as "gatekeepers" for Western medicine raised difficult issues, even if the Board's legal interpretation was credible:

> "While some people may turn to acupuncturists first for everything that ails them … it is difficult to see how practitioners of an alternative healing paradigm can be responsible for coordinating care with biomedical specialists (another potential meaning)."

(*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 25)

In sum, Legislative Counsel's opinion and LHC assert, in essence, that the Board misunderstands the effect of legislative intent language. Instead, according to these authorities, the binding statutory definition of the scope of practice is the final word on what the Board's licensees may lawfully do:

> "The terms 'oriental medicine' and 'primary health care profession' are not defined for purposes of the act. However, the scope of practice authorized by an acupuncturist's license is explicitly set forth in Section 4937 and authorizes a licensed acupuncturist to engage in the practice of acupuncture which includes performing oriental massage, acupressure, breathing techniques, exercise, heat, cold magnets, nutrition, diet, herbs, plant, animal, and mineral products, and dietary supplements to promote, maintain and restore health."

(*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 96).

Hence, while Legislative Counsel observes that the intent language could "have any number of meanings," none is sufficiently clear to warrant over-riding or expanding the scope of practice as it is established by the operative provisions of the B&P Code section 4937. Indeed, Counsel asserts that an acupuncturist is not authorized to "engage in a broader scope of practice than is authorized by Section 4937 of the Business and Professions Code." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 95).

The LHC's report also considers the legislative history of allowing patients to see acupuncturists without a "note" from a physician. The LHC concludes that the Legislative intent was simply that: the Legislature did not also intend to broaden scope of practice. Thus, LHC argues that the 1979 legislation was introduced because "lawmakers were concerned that physicians were not referring patients [to acupuncturists] and so eliminated the referral requirements, allowing patients direct access to acupuncturists." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework: September 2004*, page 19).

D. The Department of Consumer Affairs Legal Counsel also fails to support the Board's Interpretation

Finally, while the Board relies almost exclusively on a 1993 opinion from the DCA Legal Office, that opinion is far more nuanced than the Board characterizes it. The Board repeatedly refers to "Legal Opinion 93-11" as establishing that the scope of practice for acupuncturists specifies that they are "primary health care professionals." (*Sunset Review Report*, page *18*)

What that opinion says, though, is quite different. While acknowledging the phrase used in the legislative intent language, DCA counsel's thoughtful opinion looks at several specific treatment modalities – such as homeopathy, herbal medicines, etc. – and determines whether they are, in fact, within the scope of practice for acupuncturists as established by statute. The opinion also examines the question of whether – and to what extent – acupuncturists may diagnose a patient's condition in the absence of specific legislative authority to do so (this will be discussed in more detail below).

The opinion, however, does not, in any way, "conclude" or "decide" or "determine" that the legislative intent language concerning primary care expands the scope of practice for acupuncturists. Nor does it conflict with the opinions of the LHC and Legislative Counsel above.

E. Analysis

The LHC correctly observes that there are many possible interpretations of the "primary health care profession" intent language. Yet, in the Committee's opinion, the LHC and Legislative Counsel have better arguments than the Board about what it does – and does not -- mean.

First, as both LHC, Legislative Counsel, and long-standing case law teach, the Board is on precarious legal ground when it relies solely upon legislative intent language. According to Legislative Counsel's legal opinion on the legal scope of practice for an acupuncturist, the Board must abide by binding operative language defining the scope of practice and should not seek significantly to expand upon such operative standards based on undefined intent language. Such an expansion is the Legislature's and Governor's prerogative, not the Board's.

Second, there is apparently no legislative history supporting the Board's expansive reading that (1) the legislative intent language and (2) the underlying legislative aim of allowing consumers to see acupuncturists directly would allow acupuncturists to act as "primary care gatekeepers," with the power to prescribe, refer and the like using disciplines outside of Oriental medicine.

Third, eliminating the need for a "note" from a doctor to see an acupuncturist – the Legislature's clear intent -- does not logically transform acupuncturists into a kind of cross-discipline "gatekeeper" practitioner who determine if a patient needs to see another kind of practitioner and, if so, which type, and when.

Fourth, and certainly, such a significant change in an acupuncturist's scope of would not, could not and should not be accomplished solely through legislative intent language.

Fifth, as discussed more thoroughly below, the Board recognizes the potentially widespread use by licensees of unregulated and potentially untrained acupuncture assistants; some of whom may be in their teens. The Board recognizes this as an issue, if

for no other reason that it receives a large number of complaints about it from the public, but the Board has not yet set any timetable for resolving it, promising only more study.

Respectfully, it makes little public policy sense for the Board, on the one hand, to endorse and seek to expand the scope of an acupuncturist's practice as embracing Western models while simultaneously acknowledging that acupuncturists are frequently deploying unregulated and untrained (possibly teenaged) assistants to do at least some of the acupuncturist's work. At minimum, until the assistant issue is resolved, the Legislature should not endorse the Board's expanded scope of practice interpretation.

2. Educational Requirements

Apparently based on the erroneous legal interpretation discussed above, the Board is poised to require an additional 1,000 hours of training in Western medicine.

B&P Code section 4939 was amended just two years ago in 2002 and increased the entry-level curriculum standards for acupuncturists to a minimum of 3,000 hours of study pertaining to the practice of acupuncture from 2,348 hours of study. Proposed Board regulations to implement this new 3,000 hours of minimum training to become an acupuncturist would include a significant amount of education in Western or biomedical subjects.

Thus, the Board's 2004 Sunset Review Report states that the Board "continues to support an eventual entry-level standard of 4,000 hours commensurate with the profession's status as a primary health care professional, which is also in alignment with international accepted standards." (*Board's Sunset Report*, page 20)

As of January 1, 2005, before the new standard is implemented, California will require the most number of hours of any state for licensed acupuncturists. (*Acupuncture in California: Study of Scope of Practice, Report by UCSF Center for Health Professions, May, 2004*, page 32)

It appears that the goal of increasing educational hours is at least in part based upon the Board's belief that acupuncturists need to obtain knowledge of Western medicine. This, in turn, appears to be based entirely upon an erroneous over-reading of applicable law.

Thus, according to the Board's 2004 Sunset Review Report, "since the elimination of requiring a physician referral in 1979, an acupuncturist's scope of practice has expanded to include diagnosis," and "established acupuncture as a 'primary health care profession.'" (*The California Acupuncture Board, 2004 Sunset Review Report*, pages 1 and 20). Because the Board has interpreted the legislative intent language (B&P Code Section 4926) as expanding an acupuncturist's role as a "primary health care professional" the Board now claims that "the current level of education (i.e., 2,348), has not kept pace with the expanded role of a primary health care practitioner." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 20)

A. LHC's Educational Recommendations and Comments

As noted, the LHC was also requested by the Legislature and the Governor to "review and make recommendations on the education requirements for acupuncturists." (B&P Code Section 4934.1) More specifically, the LHC was asked to "review increasing curriculum hours for the licensure of acupuncturists in excess of 3,000 hours up to 4,000 hours to fully and effectively provide health services under their scope of practice." (Ibid.)

The LHC concluded that "the 3,000-hour educational requirement is adequate to prepare entry-level practitioners and to protect the public safety." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 27*)* The LHC recommends that the hours should not be increased and "should focus on traditional Oriental health practices within a modern framework for patient safety." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 38)

Below are a few of the bases for LHC's conclusion:

- "The 3,000-hour standard was not prompted by a new increase in the scope of practice. Rather, the argument [by the Board] of increasing education levels is based substantially on the 1979 change in law enabling consumers to be treated by acupuncturists without having been diagnosed and referred by medical doctors." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 29)

- "Raising educational standards beyond what is required for public safety can discourage or delay new entrants in the market place, resulting in higher fees and lower access for consumers. " (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 34)

- "The persistent argument for raising the standards to 4,000 hours is based more on the comparison with biomedical [e.g., physician] practitioners than what is needed to safely practice acupuncture." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 32)

- "An expert from the National Institutes of Health (NIH) testified that there is no evidence indicating a need to raise education hours, and that in doing so, consumer access could be unnecessarily restricted." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 34)

- "According to the Pew Health Professions Commission, the 'ostensible goal' of professional regulation -- to establish standards that protect consumers from incompetent practitioners -- is eclipsed by the tactical goal of protecting the profession's economic prerogatives." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 34)

In conclusion, the LHC suggests that "until the new standards [B&P Code Section 4939] are implemented, and students' performance assessed, there is no way of determining whether an increase in hours above the 3,000-hour standard is necessary – particularly if the scope of practice is focused on traditional Oriental medicine." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 38)

B. Analysis

Perhaps the best way to evaluate the Board's proposal to add another 1,000 hours of schooling is by considering the following: The vastly increased number of hours that would be required for *new* licensees, exceeding those of any other state in the nation, is more than double the number of hours that *existing* licensees had to take. The Board argues such a burden on new licensees is necessary to "keep pace with the expanded roll [sic] of a primary health care practitioner," and because practitioners must be abreast of the "ever-changing dynamics of science and technology applicable to the practice." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 20)

Yet the Board follows this with an argument that existing licensees not only should not be subject to the same requirements, but should not even have to attend any continuing education courses above the current sub-minimal requirement of 30 hours *every two years*. (*Ibid*.)

It is difficult to see how this double standard is intended to benefit the public. It is easier to see how it serves the "tactical goal of protecting" the "economic prerogatives" of those who already have a license. (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 38)

3. Diagnosis

Related to these scope of practice and educational issues is the question of whether an acupuncturist should be allowed to "diagnose" and, if so, what. Taken in isolation apart from the Board's interpretation of the "primary health care profession" intent language, and its effort to require more Western education, the Board's suggested scope of practice amendment appears benign and truly clarifying.

Specifically, the Board proposes to amend B&P Code section 4937 as follows:

> **Article I. "Practice of Acupuncture**
> **4937**. An acupuncturist's license authorizes the holder thereof:
> (a) To engage in the practice of acupuncture.
> (b) *To diagnose within the scope of practice of a licensed acupuncturist.*" (*The California Acupuncture Board, 2004 Sunset Review Report*, Attachment A)

However, when viewed in light of the fact that the Board believes that the "scope of practice of a licensed acupuncturist" is the ability to prescribe, refer, and similar across many disciplines based almost entirely upon mere legislative intent language, it is unclear at best whether such an addition is wise, at least until such broader issues are resolved.

Of course, the ability to diagnose is inherent in any healing art profession such as acupuncture. However, the scope of this authority for every kind of health care professional must be carefully monitored. This is particularly true for professions such as acupuncture whose licensees are restricted by statute to particular treatment modalities.

Indeed, if the Board succeeds in expanding the scope of practice of acupuncturists to include more and more Western medical science and techniques, including the ability to diagnose virtually any disease or condition, would the Board be dissolving the difference between Eastern and Western medicine that makes acupuncture a unique alternative to so many Californians? As that line disappears, the argument for returning to a single, unified Medical Board to regulate all these medical professionals becomes much stronger, since the distinctions between acupuncturists and physicians become less significant.

In contrast, preserving the distinctiveness of this medical profession helps to give Californians who want a truly different sort of medical experience a meaningful choice.

ISSUE #3: Is the Board failing in its duty to protect the public?

Issue #3 question for the Board: *How does the Board respond to specific issues of public safety set out in the LHC report, such as ensuring that acupuncturists use sterile needles?*

The LHC found that the Board "missed significant opportunities to protect the public." Specifically, the LHC report focused on sterile needles and herb safety. (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 63)

Clean Needles

The LHC has grave concerns about the Board's lack of attention to one of the preeminent public health issues of the last twenty years – clean needles. Since 1997, the National Institutes of Health has recommended the exclusive use of sterile, single-use needles to avoid obvious public health dangers like transmission of HIV or other blood-borne diseases. (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 65) Yet the Board has never so much as placed this item on one of its agendas, much less developed specific regulations to protect the public.

The Board's response to this omission was that it "has been overwhelmed by other issues." (*Ibid*)

Herb Safety

The LHC also notes the emerging issue of herb safety. Acupuncturists have the authority to administer herbs, which are not regulated by the federal Food and Drug Administration, or California, for purity, potency or effectiveness. In addition, interactions of some herbs with modern pharmaceuticals can lead to serious harm. (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, pages 67-68) Yet the Board has given scant attention to this question. While LHC notes that the Board's jurisdiction in this area may overlap with the interests of other governmental entities, there is no reason the Board could not take a lead in this exceptionally important area of consumer protection.

ISSUE #4: The use of unlicensed acupuncture assistants.

Issue #4 question for the Board: *Should the Board perform unannounced, on-site visits of offices in order to determine if acupuncturists are not accurately reporting the use of unlicensed assistants? Will the Board's proposed regulations do enough to protect consumers from treatment by unlicensed acupuncturist assistants?*

The Board reports that "unlicensed activity has remained in the top three categories of new complaint cases opened by the Board in the last three fiscal years." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 25) Ironically, according to the Board's survey, the use of assistants is low (a mere 13%) and those who had no desire to use assistants was high (73%). Nevertheless, the Board has pointed out, "The actual use of assistants reported to the Board may be higher than reported." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 27)

In 2002, the Board and the Committee both expressed concerns about the use of unregulated, unlicensed acupuncture assistants. The Board was required to investigate and conduct a study on whether licensees are utilizing assistants and report their findings to the Legislature. If the Board determined that this was a common yet unregulated practice, the Board should examine the need for licensure of these assistants and return to the Committee in two years (September 1, 2004) with a report on the frequency of the practice and the potential need for a new licensure category.

The statute reads as follows:

> **"4934.2.** The board shall conduct the following studies and reviews, and shall report its findings and recommendations to the department and the Committee on Boards, Commissions, and Consumer Protection no later that September 1, 2004:
>
> (a) The board shall conduct a comprehensive study of the use of unlicensed acupuncture assistants and the need to license and regulate those assistants.

(b) The board shall study and recommend ways to improve the frequency and consistency of their auditing and the quality and relevance of their courses."

The Board completed the required study. According to the Board's 2004 Sunset Report to the Committee:

> "Pursuant to B&P Code Section 4934.2(a), the Board has conducted a comprehensive study of the use of unlicensed acupuncture assistants in California. In order for the Board to obtain information about the use of or need to regulate acupuncture assistants in California, two surveys were distributed to all licensees. In addition, the Board reviewed the statistics on complaints filed with the Board against unlicensed activity**,** the laws and regulations relating to the use of assistants of other states and other California health care professions, as well as miscellaneous correspondence relating to the use of assistants. The Board established a subcommittee, consisting of two members of the Board, to evaluate the data and testimonies received and bring a recommendation or plan back to the Board." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 25)

The Board sent out two surveys to assess the extent that the profession was using unlicensed acupuncture assistants; however, the second survey sent out in May 2004 to 7,067 licensed acupuncturists and was a more comprehensive survey than the first one and determined the following results:

- "767 responses revealed the following:
    - 13% reported use of one or more assistants.
    - 86% reported no use of assistants.
- Of the 665 who do not use assistants:
    - 73% reported they had no desire for assistants.
    - 27% said they might hire assistants in the future.
- Of those who have hired or may consider hiring assistants, the majority of responses included the following reasons:
    - Treat more patients/better service to patients
    - Massage services
    - Front office/receptionist
    - Remove needles, moxa
    - Prepare herbs
    - Patient Intake"

(*The California Acupuncture Board, 2004 Sunset Review Report*, page 26)

The Board has made the following "findings and recommendations" in their 2004 Sunset Review to the Committee:

> "At the February 24, 2004 meeting, by unanimous vote, the Board took action to support regulating the use of acupuncture assistants to assure consumer protection and safety by clearly defining the scope of what an assistant may do and the responsibilities of the licensee using an assistant. Based on models reviewed in both the acupuncture and chiropractic professions, the Board found that the 'licensing' of acupuncture assistants is not required; but supported establishing regulations to define the requirements under which a licensed acupuncturist may employ an unlicensed assistant. These requirements would include, but not be limited to, the following:
>
> - The licensee is responsible for the performance of assistants.
>
> - A licensee shall inform the Board of the name of any assistant employed, and shall forward to the Board proof that the assistant has received training (yet to be defined).
>
> - ***An assistant shall be at least 18 years of age.***
>
> - An assistant shall not do any of the following procedures involving patients (to be defined).
>
> - An assistant may do only the following procedures involving patients (to be defined).
>
> - An assistant shall wear a tag identifying him/her to patients as an assistant.
>
> - If the Board determines that an assistant or licensee has not complied with the pertinent regulations, or that an assistant has committed any offense defined by pertinent law, the Board may:
>
> - Withdraw the assistant's permission to work as an acupuncture assistant;
> - Withdraw the licensee's permission to hire acupuncture assistants;
> - Discipline the licensee (to be defined)."

(*The California Acupuncture Board, 2004 Sunset Review Report*, page 27 – emphasis supplied)

In conclusion, the Board "recommends that the Committee accept and support the Board's findings and recommendations." (*Ibid*.)

Analysis

While the Board did complete the required report, the report fails to answer many of the most basic "what next?" questions: What should acupuncture assistants be permitted to do without a license? What level of supervision must be required? The "findings and recommendations" the Board urges the Legislature to approve are, in many instances undefined, and thus are little more than invitations for future study of the most pressing questions. And some of the recommendations that *are* specific are also fairly troubling – for example, the underscored requirement that assistants who the Board would allow to practice on the public may be only 19 year-old teenagers.

After two years of study, the Board takes no substantive position on too many critical issues, notwithstanding the fact that it is apparent that those who are not licensed to perform acupuncture are or may be doing so. And they are doing so not only without threat of sanction by the Board, but with its apparent approval.

Why has the Board not already determined what an assistant may or may not lawfully do? Why is yet more study by more task forces required? Why is the level of training yet to be defined by the Board? Why has the Board not pursued assistants for practicing acupuncture without a license? Why has the Board not addressed any of these essential issues by way of emergency regulation?

And how is it, exactly, that an assistant could be both just nineteen years old and have (in the Board's words) "received training"?

Most importantly, the report fails to commit to any date certain by which these important issues regarding – in essence the unlicensed practice of acupuncture – will be resolved.

It must also be highlighted how this issue tethers to Issue Number 1 above. In summary, what this issue is about is whether and to what extent non-licensees are allowed to practice under the umbrella of another's license. Yet the Board had to be compelled by statute to take a hard and focused look at the issue, and the Board still approaches the issue with no sense of urgency or resolve.

It is true that the statute-imposed study did not mandate that the Board reach and resolve these questions. But, in truth, this issue raises no less than the issue of the unlicensed practice of acupuncture and the Board should not have to be mandated to address this issue quickly and definitively. And it goes without saying that unless and until the role of assistants is definitively resolved, allowing the Board to allow acupuncturists to perform more and more Western therapies is simply dangerous public policy.

ISSUE #5: Under certain instances, other licensed health practitioners, such as physicians, podiatrists and dentists, are also practicing acupuncture.

Issue #5 question for the Board: *Is the Board aware of allopathic doctors, podiatrists, or dentists who are practicing acupuncture? More specifically, can the Board explain how a dentist would go about performing acupuncture on a patient – rather than inserting a needle or syringe with Novocain to a patient? Please expand upon and clarify what the Board interprets as practicing acupuncture. If the Board believes there are doctors performing acupuncture without taking any coursework or training, has the Board taken disciplinary action against these people?*

Background: In 2002, the Committee recommended that the Board examine ways to ensure consumers are not harmed by exempted practitioners and report the results to the Committee at the next review. According to the Board, "an exempted practitioner refers to an allopathic doctor, podiatrist or dentist who is authorized to perform acupuncture by virtue of their own scope of practice (i.e., needle insertion)." (*Acupuncture Board's Responses to the Committee*: page 5 and B&P Code Section 4935).

The Board asserts that it "feels that the 200-300 hour course in Oriental medicine often taken by an allopathic doctor, podiatrist or dentist is totally inadequate and that proper adequate and complete program training in Oriental medicine diagnosis is essential to ensure safe and effective treatment." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 29). However, the Board has not made it a priority to study the use of acupuncture by other licensed health practitioners to determine if this indeed a problem.

The Board's 2004 Sunset Report to the Committee states the following:

> "The Board's position that proper, adequate and complete program training in Oriental medicine diagnosis is essential to ensure safe and effective acupuncture treatment remains. The Board started gathering the curriculum requirements, course syllabi and educational objectives from colleges (i.e., UCLA) that offer the 200-300 hour course in Oriental medicine often taken by an allopathic doctor, podiatrist or dentist. However, due to the extensive workload on special projects the last couple of years, the Board has been unable to complete the review of this issue. It is the impression of the Board that the majority of allopathic doctors, podiatrists or dentists who perform acupuncture and Oriental medicine in their practices, do so without having taken any coursework or training. This issue remains of concern to the Board and is an objective in the Board's strategic plan to be continued over the next year or so." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 29)

The Committee presented a set of follow-up questions to the Board regarding why the Board had not already completed its examination of exempted practitioners. Specifically:

"According to the [sunset] report, the Board has been unable to complete the review of this issue. Why wasn't this accomplished? When will the Board complete this task? Please explain."

In response, the Board states only that, "it is their understanding that the majority of allopathic doctors, podiatrists or dentists who perform acupuncture and Oriental medicine in their practice, do so without having taken any coursework or training."

Needless to say, such widespread unlicensed activities should have prompted vigorous and swift response from the Board. To the Committee's knowledge, however, the Board has failed to act on this issue at all.

ISSUE #6: The Board does not and has not had a faculty member appointee for two years, notwithstanding the legal requirement that there be one.

Issue #6 question for the Board and DCA: *What has the Board done to encourage the appointment of a faculty member who is on a Board approved acupuncture college? Has the Board been in contact with the Governor's office regarding the appointment?*

The 2001-02 review of the Board concluded that the Board should have one member who is on the faculty of a California acupuncture school. The Board, Committee, and the DCA supported this recommendation and B&P Code Section 4929 was amended to state that "one member of the Board shall be a licensed acupuncturist who is also a faculty member of any board approved acupuncture college."

However, the Board concedes that "no appointment has been made to the Board for a licensed acupuncturist/faculty member." (*Board's Sunset Review Report,* page 9)

This position has been vacant for two years.

ISSUE #7: The law provides that a majority of the appointed members of the Board shall constitute a quorum. Vacancies continue to be a problem for the Board.

Issue #7 question for the Board and DCA: *How many members of the Board should constitute a quorum? Why are vacancies an enduring problem?*

Board vacancies are a stubborn and persistent problem with this Board. According to B&P Code Section 4919, the Board's composition is to include nine members:

- Three members shall be acupuncturists with at least five years experience in acupuncture and not licensed as physicians or surgeons.

- One member shall be a licensed acupuncturist who is also a faculty member of any board approved acupuncture college.

- One member shall be a physician and surgeon licensed in this state with two years experience in acupuncture.

- Four members shall be public members who do not hold a license or certificate as a physician and surgeon or acupuncturist.

In 1998, the Acupuncture Committee was removed from the Medical Board's jurisdiction and renamed the California Acupuncture Board. At that time, the Board's membership was reduced from 11 (5 licensed acupuncturists, 2 physicians with acupuncture experience, and 4 public members) to 9 members (4 acupuncturists, 4 public members, and 1 physician). According to the Committee's 1998 Sunset Review recommendations, the membership was reduced in order to provide a better balance between the number of professionals and the number of public members based on the belief that having the profession in control of the Board could lead to self-interested results.

In 2002, the Board had two vacancies – one acupuncturist and one physician member.

Currently, the Board has only four appointed members (3 public, 1 licensed) and shortly will be down to only three members (2 public and 1 licensed). (*The California Acupuncture Board, 2004 Sunset Review Report*, page 1).

It appears that the Board has never operated with a complete membership since its creation in 1998 and is now having difficulty maintaining a quorum of only five members.

In part to try and address this problem, in 2002, the Committee recommended that five members of the Board constitute a quorum for the transaction of business at any meeting. This was consistent with the policy of other regulatory boards within the DCA. The Board and the DCA supported this recommendation and B&P Code Section 4933 was amended to require that "five members of the Board constitute a quorum for the transaction of business at any meeting."

The reduced quorum requirement has worked – until recently – to allow the Board to function. The Board states that "it continues to support this [recommendation] and has functioned under the requirement that five members constitute a quorum." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 10)

The Board's 2004 Sunset Review Report states: "the Board has functioned with only six appointees to the Board – two professional members and four public members [.]" (*The California Acupuncture Board, 2004 Sunset Review Report*, page 10)

However, the Board has not had even a reduced quorum since June 1, 2004: "effective June 1, 2004 the term ended for two Board members appointed by the Governor…since

August 1, 2004 the Board for the first time has been without a quorum to make policy decisions." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 10)

According to the Board's Executive Officer, as of November 9, 2004, the Board was still without a quorum but was working with the Governor's office to ensure appointments were filled. Until a quorum is reached, no policy or enforcement decisions can be made and, therefore, the Board is incapable of functioning at this point.

Analysis

In sum, for six years this Board has been persistently unable to fill nine positions. For most of 2004, the Board functioned with a majority of public members. There appears to be little – or questionable -- interest among the profession in participating as Board members. As previously noted, the Board has not enjoyed a member representing the academic community, notwithstanding the legal requirement that one be appointed.

ISSUE #8: Enforcement of the Board's continuing medical education (CE) program, and its ability to audit licensees to ensure compliance with the continuing education requirements.

Issue #8 question for the Board: *It is unclear to the Committee if the Board's improved auditing process is practical or effective. Could the Board please clarify its auditing process for CE of licensees in further detail?*

Acupuncturists are required to complete 30 hours of continuing education every two years as a condition for renewal of their licenses (B&P Code Section 4945). The Board is authorized to audit, once a year, a random sample of acupuncturists who have reported compliance with the continuing education requirement.

In 2002, the frequency and consistency of the Board's auditing and the quality and relevance of Board CE courses was a concern of the Committee, as it had been at the prior review in 1998. In particular, the Committee had concerns about self-certification of licensees for CE and the fact that licensees did not have to submit a certificate proving he or she had completed a CE course. (The Board has authorized licensees to complete up to 50% of their continuing education requirements on an independent or home study basis.)

The Committee recommended that the Board study ways to improve the frequency and consistency of their auditing and the quality and relevance of their CE courses.

The Committee also required the Board to provide the results of its study of the CE program and make recommendations on any changes that are necessary to improve the overall quality of the program at the next review per B&P Code Section 4934.2.

The Board's Sunset Review Report states the following regarding their study of the continuing education auditing process:

> "The audit process is fully implemented now that the Board has collected two years of attendance records and the Board sends the audit letter to the selected licensees monthly. The audit letter received by the licensee also contains language that would allow the Board to issue a citation and a fine should a licensee fail to comply with California Code of Regulations (CCR) 1399.489." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 31)

Essentially, the Board's audit process consists of the following: licensees send in their CE certificates to the Board. CE providers submit attendance records of licensees to the Board and, in turn, the Board takes a random sample of acupuncturists who have claimed to attend CE courses. By verifying if a licensee has indeed attended a CE course with a CE provider, the licensee is considered audited. Apparently, prior to this study, CE course attendance was not verified, even by a random sample.

The Board also surveyed licensees regarding the quality and relevancy of CE courses. The Board created three different review panels comprised of CE providers, licensees, and board members to discuss and evaluate CE courses, based on the surveys and the consolidated recommendations made by each review panel.

These panels then identified the strength and weaknesses of the current CE program. On these bases, the Board suggests the following proposed changes in the future to the CE program:

> "1) CE course credits are classified into 2 categories, plus 1 mandated subject.
>
> Category 1: Courses related to knowledge or technique skill required for the practice acupuncture. Up to 24 hours allowable per 2-year renewal period.
>
> a. Acupuncture & Oriental medicine.
> B.Western medicine as related to acupuncture practice (maximum allowable hours to be discussed).
> c. Other Subjects under Scope of practice (maximum allowable hours to be discussed).
>
> Category 2: Other subjects (allowable up to 4 hours for subjects listed below)
>
> a. Research and evidence-based medicine as related to acupuncture & Oriental medicine.
> b. Practice management subjects, which will improve the health of the patient or for the patient's benefit such as risk management, record keeping, acupuncture law and regulation, ICD9 code, report writing,

workers comp law and regulation, and Ethics related.

c. Breathing & other exercises (i.e., qi gong, tai qi quan, etc) with emphasis on utilization for patient care and not only for practitioner benefit.

Mandated courses:

a. Drug-herb interaction (4 hours per renewal cycle).
b. CPR certification course approved by the American Red Cross or American Heart Association.
c. Ethics Course (4 hours required of new licensee with first license renewal).

2) CE credits will not be accepted for retaking of courses previously taken within 2 years.

3) CE course instructor's experience in the subject area is increased from 1 year to 5 years, consistent with the requirement for instructors under the new 3000-hour curriculum. This is also consistent with Dental Board instructor requirements.

4) If the CE course is taught in a foreign language with translation, only 50% credit is allowed. However, on a case-by-case review, a higher percentage credit may be approved if translation is done simultaneously with no lost of course time due to the translation (such as the simultaneous listening to the translation via headsets).

5) Maximum credits allowed per day are 8 hours.

6) Advertisements for CE courses must provide the following information:

a. Level of difficulty (i.e. 'beginner', 'intermediate', or 'advanced', etc).
b. Disclosure of products if made available to participants of the seminar (needs further discussion).
c. Course titles shall reflect course content and not contain marketing language.

7) Board will continue to randomly audit 10% of the licensees for CE compliance, exceeding California regulation code 3862 (f) requirement of 5% random auditing.

8) Make filing of complaints and feedback easier via online CE course complaint forms and onsite CE course feedback forms directly mailed to the board.

9) Investigation of complaints related to CE courses may include but not limited to the auditing of the course by Board staff, subject expert, auditing pool, or other consultants, and may also include a survey of all attendees of the course, request for video tape of the course for review, etc.

10) The CE Panel, along with the CE Focus Group, both concurred that 50% of CE credits may be allowed for distant learning CE courses. Each distant learning course shall require attendees to pass a written examination (of at least 10 questions) to receive credit. 'Hands-on diagnostic or treatment techniques are not allowed for distant learning' credits. It was the consensus of the CE Committee that more work needs to be done in regard to quality control and regulation of distant learning courses.

11) All panel members agree that CE providers should be subject to enforcement action for unethical, fraudulent or unprofessional conduct. This issue should be forwarded to the Enforcement committee for further review and recommendation." (*The California Acupuncture Board, 2004 Sunset Review Report*, pages 32-33)

ISSUE #9: Whether ACAOM's approval process for schools used in 39 other states is superior and less costly than the Board's.

Issue #9 question for the Board: *If the approval process of the Accreditation Commission of Acupuncture and Oriental Medicine (ACAOM) is used by 39 other states and appears to be a better approval process according to the LHC, why doesn't the Board support the use of ACAOM?*

During that Board's last Sunset Review in 2002, the Committee concluded that due to limited resources the Board had continued to look at the issue of how schools are approved without resolution and had not focused on the acupuncture school approval process since the time of their last reporting to the Committee, in 1998. As a result, the Board and the DCA required the LHC to review and conduct a comprehensive comparative analysis of the school approval process of the ACAOM, the approval process of the BPPVE, and the Board's approval process. The LHC was to provide its recommendations to the Legislature by September 1, 2004 (per Section 4934.1 of the B&P Code).

The LHC's Report

The LHC's report concluded that "the process used by the Accreditation Commission of Acupuncture and Oriental Medicine (ACAOM) appears to be superior to the school approval process used by the Acupuncture Board and could be used by the State to ensure the quality of education for potential licensees." (*Little Hoover Commission, Regulation of Acupuncture*, page 55)

Some factors pointed out in the LHC's report in support of this recommendation include:

- "39 other states and the District of Colombia that license acupuncture rely upon ACAOM accreditation to ensure quality. Students must graduate for ACAOM-approved school prior to taking the licensure exam in those states. Only California has its own approval process."

- "The State's process of reviewing and approving a school's baseline quality is not as rigorous as the process used by ACAOM."

- "ACAOM accredited programs must require that students complete 60 semester hours (two years) of college coursework before entering the acupuncture school. The California Acupuncture Board has no similar requirement."

- "ACAOM accredits programs for a limited time period – one to five years, depending on the quality and stability of the program. The Acupuncture Board's approval does not expire. ACAOM's periodic review is a more rigorous monitoring process that assesses programs once approved, continues to meet standards. Three California approved schools by the Board have not met or lost ACAOM accreditation."

- "Information about ACAOM's guidelines, procedures, accounting, decision-making, etc., is more detailed and publicly available than the Board's."

- "California Board's approval process is more focused on ensuring schools meet minimum requirements, while ACAOM's process is more focused on continuous improvement of programs that meet minimum requirements."

- "Researchers for the LHC's report were told repeatedly that California's staff seemed to be overburdened and did not have adequate resources to perform their required duties."

- The LHC points out that by relying on the ACAOM to assess individual schools, the Board "would have more time and resources to

spend on enforcement, clinic audits, continuous competency improvement of licensees and refining the California exam."

- In conclusion, the LHC recommends "California should rely upon the ACAOM to accredit acupuncture schools, and other institutions for accreditation that are recognized by the Secretary of Education, while developing a mechanism to ensure that state-specific curriculum standards are met." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, pages 56-61)

The Board's Response

The Board disagrees with LHC. According to the Board's 2004 Sunset Review Report to the Committee, "it does not accredit acupuncture schools, but approves the school and its curriculum program to ensure it meets the standards adopted by the Board." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 34) Furthermore, the Board asserts that "accreditation is not a replacement for government regulation." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 35) The Board's 2004 Sunset Report supports this statement as follows:

> "Public institutions receive their approval to operate through the state Constitution and legislative action. Accreditation is a voluntary, private-sector evaluation. Accrediting bodies cannot force institutions to comply with state and federal laws, and do not view their role as regulatory." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 35)

According to the Board, "it has taken the position to retain the Board's school approval process as a requirement for a graduate student to qualify for the CALE." The Board took this position because it believes that "national scope, practice or educational standards 'do not' exist in this profession, which is largely due to the variance in the scope of practice from state to state," and therefore the state should retain its own school approval process rather than a national accrediting body (e.g., NOMAA or ACAOM). (*The California Acupuncture Board, 2004 Sunset Review Report*, pages 35-36)

Analysis

Based on the LHC's findings that a majority of other states rely upon the ACAOM accreditation, the Committee sees no reason why California should not adopt the ACAOM accreditation process as well. Specifically, the LHC points out:

> "39 other states and the District of Colombia that license acupuncture rely upon ACAOMaccreditation to ensure quality. Students must graduate for ACAOM-approved school prior to taking the licensure exam in those states. Only California has its own approval process." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 56)

The Board is technically correct in observing that "[a]ccreditation is a voluntary, private-sector evaluation" and that "[a]ccrediting bodies cannot force institutions to comply with state and federal laws, and do not view their role as regulatory." But it is decisively not true that such observations preclude the Board or the Governor and the Legislature from adopting national standards as their own and, thus, infusing the private-sector evaluation with public sector enforcement consequences.

In sum, nothing prevents the Legislature and Governor from adopting ACAOM accreditation as the Board's own accreditation, just as 39 other states have done, thus making the absence of such an accreditation no less a violation of California law than the absence of the Board-approved accreditation under current law.

For these reasons, as LHC remarks, "California could require that schools document that they have met any California-specific legal requirements that exceed national accrediting standards." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 61)

ISSUE #10: The Committee recommended that the Board should continue evaluating the National Examination, given the time, effort, and cost involved in providing the Board's California-only examination.

Issue #10 question for the Board: *Does the Board agree with the LHC's recommendation that the California Acupuncture Licensing Exam (CALE) should remain the state's licensing examination?*

In 2002, the Committee recommended that the Board evaluate the national examination administered by the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM) and determine whether or not the national exam should be offered in California in lieu of, or as part of the State examination. The Board supported this recommendation, as well as the DCA; however it was requested that the LHC conduct the study instead of the Board.

The LHC indicates that the CALE exam should remain as the licensing exam. According to the LHC's report, "both examinations were found by independent statistical and psychometric analysis to be sound . . . however, California's more extensive technical documentation of underlying exam factors was determined to be superior." (*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, page 53)

The LHC has recommended that policy-makers may wish to consider the following opportunities for improvement upon the CALE:

- "Require essential safety knowledge: Establish must-pass components of the exam to ensure that applicants in each area that is essential for public safety. For example, the California licensing exam is structured so that candidates must achieve a particular score on the test to be considered as minimally competent and

therefore is eligible to receive a license to practice. Therefore it's possible for candidates to lack knowledge in certain areas, such as the regulations for public health and safety, and still pass the exam if the candidate demonstrates knowledge on other topics. In theory, even if a candidate does poorly on health and safety questions, he or she would still be licensed to practice by the state.

- "Ensure balance: It is important that the exam tests the underlying knowledge, skills, and abilities required to safely practice acupuncture and traditional Oriental medicine without discriminating against one county's style as opposed to another because acupuncture has evolved differently in different regions where it is practiced."

- "Prove physical skill: The state hasn't replaced the discontinued component of the examination that required applicants to demonstrate needling practices. Therefore, agreement about how to prove that skill has been one of the most controversial elements of the exam."

- "Develop internships: An alternative approach to proving physical skill would be to require a post-graduation, pre-examination clinical internship. The Board's efforts have failed but should be pursued by developing a strategy with complementary medical clinics, drug treatment program, Kaiser and other large health care systems. Experts recommend the following requirements for such internships:

    - Prerequisite for taking the licensure examination.
    - Conducted in practical and hands-on clinical settings away from school.
    - Supervised by licensed practitioners with specific hours of supervised practice that follow careful bookkeeping.
    - Designed with rotations that may include pain, addiction, and complementary therapy clinics of academic medial centers, as well as jails and prisons.

- Modeled after other successful professional internship programs for instance, the Board of Behavioral Sciences internship for marriage and family therapists. "

(*Little Hoover Commission, Regulation of Acupuncture: A Complementary Therapy Framework*, pages 52-53)

According to the Board, it supports retaining the CALE as entry to the acupuncture profession over the NCCAOM's exam. In the Board's 2004 Sunset Review Report to the Committee, the Board states the following reasons for this preference:

- "The CALE is less expensive at a cost of $550 vs. NCCAOM's which is $900. Candidates applying for NCCAOM's exam are charged additionally for separate types of certification exams or modalities: $750 for Asian bodywork therapy, $750 for Chinese herbology certification, etc."

- "The CALE is only one exam because the scope of practice for acupuncture in California encompasses all modalities, e.g., Oriental massage and acupressure, nutrition and diet, etc. Unlike NCCAOM, the Board doesn't support separate licensure categories for individual modalities."

- "The CALE is more difficult than the national exam. According to the Board, 'students consistently have communicated and testified before the Board that they view the national exams as prepatory to the CALE and equate the national exam quality to their second year comprehensive school exams."

- "California's scope of practice is broader than other states. NCCAOM covers 40 states that have lower education requirements and scope of practice. According to the Board, "if California recognizes the national exam it would lose the ability to oversee and control the exam quality and level of expertise to practice in this state." (*The California Acupuncture Board, 2004 Sunset Review Report*, page 23)